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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend 28 U.S.C. §1404(a) to be utilized by plaintiffs as a device to permit litigation of a claim in the forum where that claim arose, when the claim was barred by that forum's applicable statute of limitation?

2. If Congress did so intend, does 28 U.S.C. §1404(a), as applied, exceed the powers which the United States Constitution has conferred upon Congress or impermissibly infringe on the powers which the Constitution reserves to the states?

STATEMENT OF CORPORATE AFFILIATIONS PURSUANT TO RULE 28.1

John Deere Company is a wholly-owned subsidiary of Deere & Company. Deere & Company is a publicly-owned corporation which does not have a parent company. John Deere Company does not have any corporate subsidiaries or affiliates.

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SUMMARY OF ARGUMENT

Petitioners' Tort Action arose in Pennsylvania and would have been barred by Pennsylvania's two year statute of limitations if Petitioners had originally filed the action in Pennsylvania. Petitioners' Tort Action has no connection with Mississippi; it was filed there solely to take advantage of the state's six year statute of limitations. Petitioners' moving to transfer their Tort Action to Pennsylvania is tantamount to originally filing the action in Pennsylvania.

There is no evidence that Congress intended 28 U.S.C. § 1404(a) to be used by plaintiffs as a device to allow litigation in the forum where a plaintiff's claim arose when that forum's statute of limitations would have barred the claim had it originally been filed in the forum. Section 1404(a)'s legislative history discloses that Congress did not specifically consider the choice of law consequences of transfer. To the extent that an intent may be discerned, the Reviser's Note's statement that § 1404(a) was "drafted in accordance with doctrine of forum non conveniens" and the fact that a dismissal on forum non conveniens grounds necessarily changed the applicable choice of law rules to those of the new forum in a subsequently filed action indicate that Congress contemplated that the transferee forum's choice of law rules would apply following transfer.

If Petitioners' interpretation of 28 U.S.C. § 1404(a) is adopted, then § 1404(a), as applied to the facts of the present matter, violates the United States Constitution by imposing a de facto federal statute of limitations for claims arising under state law in which diversity jurisdic-

tion exists. Petitioners' interpretation contradicts the constitutional principles enunciated in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

ARGUMENT

I. Congress Did Not Intend 28 U.S.C. §1404(a) To Be Utilized By Petitioners To Litigate Their Tort Action In Pennsylvania, Where It Arose, When Pennsylvania's Statute Of Limitations Would Bar The Tort Action Had Petitioners Originally Filed It In Pennsylvania.

Petitioners' personal injury claim against Deere & Company arose in Pennsylvania: Petitioners reside in Pennsylvania; the John Deere combine was purchased by Petitioners in Pennsylvania; and Mr. Perona's accident occurred on his Pennsylvania farm. The claim has no factual connection with the State of Mississippi. Had Petitioners' Tort Action been filed on July 25, 1985 in either a state or federal court sitting in Pennsylvania the action would have been barred by Pennsylvania's two year statute of limitations for personal injuries caused by tortious acts. 42 Pa. C.S.A. §5524(2). Pennsylvania considers its statute of limitations to be procedural and, therefore, generally applicable to actions filed in Pennsylvania. *Delinski v. Raymark Industries, Inc.*, 819 F.2d 377 (3d Cir. 1987). *See Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953). By their use of 28 U.S.C. §1404(a) Petitioners have effectively "filed" their Tort Action in Pennsylvania. 28 U.S.C. §1404(a) is silent as to which state's choice of law rules should govern in the case of transfer. In the absence of a clear indication that Congress so intended when it

enacted 28 U.S.C. §1404(a), that section should not be interpreted to allow Petitioners to do indirectly what Pennsylvania's tort statute of limitations and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) would prevent them from doing directly.

28 U.S.C. §1404(a) was only a small part of the massive undertaking embodied by the Judicial Code of 1948. The provision was proposed by Professor James W. Moore, who acted as a special consultant to the revision staff of the Judicial Code. 1A(Pt. 2) J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice*, ¶0.345[4.-1] at 4333 (2d ed. 1989). The legislative history of 28 U.S.C. §1404(a) contains nothing to suggest that Congress specifically considered the matter of applicable choice of law rules when it enacted 28 U.S.C. §1404(a).[1]

> The legislative history of the 1948 revision of the Judicial Code shows that Congress failed even to recognize the choice of law problem. In Congressional hearings and debates, Section 1404(a) is mentioned only once, with no attention given to the problem. Furthermore, according to Professor Moore, who proposed §1404(a), the Advisory Committee did not consider the question either. [footnotes omitted]

Note, *Choice of Law After Transfer of Venue*, 75 Yale L.J. 90, 94 (1965).[2]

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[1] The complete legislative history of §1404(a) was included in *Special Pamphlet on PL-773, June 25, 1948, c. 646, 62 Stat. 937*, U.S. Code & Cong. Serv. 80th Cong., 2d Sess. 695 (1948).

[2] Although *Moore's Federal Practice* states, with little analysis, that "it appears that the *Van Dusen* rule should apply after

(Continued on following page)

The Reviser's Note to 28 U.S.C. §1404 did not expressly address the choice of law issue, stating in relevant part:

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 1941, 62 S. Ct. 6, 314 U.S. 44, 86 L.Ed. 28 which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

The legislative history in which 28 U.S.C. §1404(a) was discussed does not reveal any Congressional intent to overturn the existing rule under which a state or federal court sitting in Pennsylvania would have held Petitioners' Tort Action to be governed by Pennsylvania's statute of limitations in the event that the Petitioners had selected Pennsylvania as the forum in which to litigate their claim.

On March 7, 1947 Professor Moore appeared before House Judiciary Sub-Committee No. 1. With regard to the

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such a [plaintiff-initiated] transfer", *supra*, ¶ 0.345[4.-5] at 4351, that treatise fails to cite any legislative history to support the proposition that the Congress so intended, despite Professor Moore's unique vantage point concerning the enactment of §1404(a). Similarly, Professor Moore's 1949 commentary did not even address the choice of law issue. Moore, *Commentary on the Judicial Code* ¶0.03(29) at 200-211 (1949).

general purpose and scope of the proposed legislation he testified as follows:

> As I see it, the revision involved at least the following problems:
>
> (1) A study of the materials involved in title 28, United States Code, and other materials that were properly related to the Federal judiciary and which should be contained under title 28.
>
> (2) Elimination of deadwood.
>
> (3) Improvement.
>
> The later might have involved far-reaching change. For example, diversity jurisdiction might have been eliminated, as many have advocated. *But the revision has made no basic changes.* [Emphasis supplied]

Hearings before Subcommittee No. 1 of House Committee on the Judiciary on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. 27 (1947) Professor Moore then proceeded to comment specifically on various aspects of the H.R. 2055. Regarding venue he testified:

> Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See Section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518.

Id. at 29.

The report to accompany H.R. 3214 (a later designation of H.R. 2055) alluded to the proposed §1404(a) under the heading "Examples of Changes in Law" as follows: "So also, minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser's notes under Sections 1391-1406." H.R. Rep. No. 308, 80th Cong., 1st Sess. 5 (1947).

General remarks regarding the proposed revisions to the Judicial Code also evince the lack of any Congressional intent to make the radical change in choice of law rules which would be effected by Petitioners' interpretation of 28 U.S.C. §1404(a). Thus, the Honorable Albert B. Maris, Chairman of the Judicial Conference committee which was appointed to collaborate with the House Committee on Revision of the Laws (whose work was taken over by the Judiciary Committee) testified:

> [W]e regard the revision as incorporated in H.R. 2055 as having been extremely well done. The existing material has been rearranged in a logical and consistent way so as to make any particular provision quite easy to find. Existing inconsistencies and ambiguities have been removed and obsolete and archaic provisions eliminated or modernized. At the same time care has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval.

Hearings before Subcommittee No. 1 of House Committee on the Judiciary on H.R. 1600 and H.R. 2055, 80th Cong., 1st Sess. 19 (1947). Judge Maris's remarks were echoed by the Senate Judiciary Committee's report on H.R. 3214:

> Many noncontroversial improvements have been effected which, while individually small in themselves, add up to a very substantial improvement in and modernization of the law relating to the Federal judiciary. At the same time great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval.

S. Rep. No. 1559, 80th Cong., 2d Sess. 2 (1948).

If Congress had understood that it was enacting legislation which would, in the case of individuals and entities doing business on a nationwide basis, allow plaintiffs with state common law claims to effectively implement the most favorable state choice of law rules as federal law, Respondent submits that the change would scarcely have met "with substantially unanimous approval." On the contrary, such legislation would undoubtedly have been denounced as an unwarranted intrusion into matters which were properly within the discretion of state legislatures and courts. (Congress may be presumed to have been aware of the relative parameters of federal versus state power which had been enunciated in the then-recent decisions in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).)

Examination of the specific purposes for which 28 U.S.C. §1404(a) was enacted, relative to the forum non conveniens doctrine from which it was derived, also reveals the absence of any Congressional intent that §1404(a) should be interpreted in the manner which Petitioners advocate. Indeed, such an examination supports the contrary conclusion that Congress intended that the

transferee forum's choice of law rules apply following transfer. Two purposes of 28 U.S.C. §1404(a) are beyond dispute: (1) to mitigate the harshest effect of the forum non conveniens doctrine – dismissal – by providing for transfer to a more convenient forum; and (2) to make transfer available in litigation under special venue statutes (such as 45 U.S.C. §56), as well as in actions under the general federal venue statutes. The first purpose is inherent in the statute. The second purpose is established by both the section's plain language and the Reviser's Note referring to *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941). *Ex Parte Collett*, 337 U.S. 55 (1949).

The applicability of the forum non conveniens doctrine to common law actions for money damages brought in federal court pursuant to diversity jurisdiction was definitively established by the decision in *Gilbert v. Gulf Oil Corp.*, 330 U.S. 501 (1947), but that decision did not create a new doctrine. Dismissal of an action on the basis of forum non conveniens was attended, *inter alia*, by the following consequences: (1) the possible barring of the action in a subsequent forum as the result of the lapse of the new forum's statute of limitations during the pendency of the original action; (2) the inconvenience and expense of re-serving defendants with process; and (3) the dissolution of temporary restraining orders and/or preliminary injunctions. 28 U.S.C. §1404(a)'s substitution of transfer for dismissal avoided each of these effects. There was another consequence of dismissal on forum non conveniens grounds, however, namely a change in the applicable choice of law rules upon re-filing in a new forum, which transfer would not necessarily alter.

The final Reviser's Note stated that 28 U.S.C. §1404(a) was "drafted in accordance with the doctrine of forum non conveniens".[3] The Court has described this Reviser's Note as "authoritative" in interpreting §1404(a). *United States v. National City Lines*, 337 U.S. 78 (1949). In *Ex Parte Collett, supra*, the Court emphasized the frequency with which the reviser's notes were disseminated to the Congress while §1404(a) was under consideration. 337 U.S. at 69-71. The Senate's attention was also drawn to the proposed §1404(a)'s relation to forum non conveniens by testimony referring to the Court's application of that doctrine in *Koster v. Lumberman's Mutual Casualty Co.*, 330 U.S. 518 (1947). *Hearings before the Senate Committee on the Judiciary on H.R. 3214*, 80th Cong. 2d Sess. 71-73 (1948).

Webster's Ninth New Collegiate Dictionary (1985) and the *American Heritage Dictionary of the English Language* (1970) define "accordance" as "agreement, conformity". The change in applicable choice of law rules which attended a forum non conveniens dismissal was a product of the traditional view that in general the applicable choice of law rules were determined by the rules of forum in which an action was litigated. *E.g., Restatement of Conflict of Laws*, §7 (1934). Thus, at least in the case of a

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[3] When §1404(a) initially appeared in the draft revision of the Judicial Code it was accompanied by a reviser's note stating: "Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of forum non conveniens . . . ". *Ex Parte Collett, supra*, 337 U.S. at 68-69.

plaintiff-initiated §1404(a) transfer, a change of the applicable choice of law rules is appropriate as being "in accordance" with the doctrine of forum non conveniens. Additionally, Congress could have quite reasonably been under the impression that *Erie R. Co.* v. *Tompkins*, *supra*, *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, *supra*, and *Guaranty Trust Co.* v. *York*, *supra*, should be taken at face value as requiring district courts to apply the transferee forum's choice of law rules, i.e. those "of the states in which they sit," *Griffin* v. *McCoach*, 313 U.S. 498, 503 (1941), notwithstanding the Court's later characterization of such an interpretation as "superficial". *Van Dusen* v. *Barrack*, 376 U.S. 612, 636 (1964).

Petitioners' arguments in support of their interpretation of 28 U.S.C. §1404(a) are based almost entirely on the circumscribed examination of the legislative intent underlying §1404(a) which is contained in *Van Dusen* v. *Barrack*, rather than upon direct examination of §1404(a)'s legislative history or analysis of its purpose in the context of the forum non conveniens doctrine. Petitioners seize on two statements from *Van Dusen*.[4] The first is that the "legislative background supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from

[4] Preliminarily one should note that the facts pertaining to initial forum selection in *Van Dusen* contrast sharply with those of the present matter. In *Van Dusen* the action was filed in the United States District Court for the Eastern District of Pennsylvania by Pennsylvania fiduciaries representing the estates of Pennsylvania decedents who died on a flight bound for Philadelphia. 376 U.S. at 613-614.

the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of §1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.' " [footnotes omitted] *Van Dusen* v. *Barrack*, *supra*, 376 U.S. at 635-636. Secondly, Petitioners rely on the Court's (expressly restricted) conclusion "that a change of venue under §1404(a) generally should be, with respect to state law, but a change of courtrooms." [footnote omitted] *Van Dusen* v. *Barrack*, *supra*, 376 U.S. at 639. Petitioners then argue that the foregoing considerations weigh just as strongly in favor of applying the transferor forum's choice of law rules in the case of a plaintiff-initiated transfer.[5] If so, and if no other factors

[5] Later, in passage worthy of Lewis Carroll, Petitioners attempt to recast the facts of the present case into the *Van Dusen* mold: "By not opposing the transfer and then seeking to have the case dismissed in Pennsylvania because of Pennsylvania's statute of limitations, Respondent has essentially used a Section 1404(a) transfer to defeat the state law advantages which had accrued to the Petitioners from the proper exercise of their venue privilege. *Van Dusen* teaches that such a use of §1404(a) is improper." (Petitioners' brief at 23 n. 13). Petitioners' repeated reference to Respondent's non-opposition to the motion to transfer venue is the reddest of herring. There was no legitimate reason to oppose the transfer motion. The only basis for opposing the motion would have been a desire to gain some tactical advantage from Petitioners' intentional choice of an inconvenient forum by virtue of Respondent's superior financial resources. The fact that there was no legitimate reason for opposing transfer simply underscores the absolute lack of any connection between the Tort Action and the State of Mississippi.

are to be considered, why was the Court in *Van Dusen* at pains to limit its holding to defendant-initiated transfers?

One obvious answer is that the Court foresaw the possibility of just the sort of manipulative use of 28 U.S.C. §1404(a) by a plaintiff which the district court and the Third Circuit have refused to countenance in the present action. In such circumstances there would not be any reason for *Erie* purposes to treat Mississippi as the state of filing. Additionally, it may be that the Court realized that the nature of its analysis of legislative intent, which was essentially based on a view that the absence of evidence to demonstrate an intent that there should be a change of law following defendant-initiated transfer supported the contrary proposition that Congress positively intended that there should not be a change of law, could well dictate the opposite result, i.e. application of the choice of law rules of the transferee forum, in the event of a plaintiff-initiated transfer. The preceding portions of this brief demonstrate that there is even less support for the view that Congress intended §1404(a) to be interpreted as desired by Petitioners, than *Van Dusen* found for the proposition that Congress intended a defendant-initiated transfer to result in application of the choice of law rules of the transferee forum. Thus, the decisions by the district court and Third Circuit in this case are consistent with *Van Dusen*'s unwillingness to allow a manipulative use of §1404(a) in the face of that section's less than conclusive legislative history.

Although *Van Dusen*'s general approach to statutory construction comports with the view that the transferee forum's choice of law rules should apply in the case of a

plaintiff-initiated transfer, Respondent doubts the correctness of that portion of the Court's opinion which stated that the "legislative background supports the view that §1404(a) was not designed . . . to defeat the state-law advantages that might accrue from the exercise of [plaintiff's] venue privilege . . . ". 376 U.S. at 635. Respondent respectfully questions how the failure to enact the Jennings bill pertaining to the Federal Employers' Liability Act evinces a Congressional intent to preserve the state-law advantages which might accrue as the result of the plaintiff's opportunity to select the original forum. Section 1404(a) was, after all, "drafted in accordance with the doctrine of forum non conveniens" which operated to destroy such advantages. The difficulty with this aspect of the *Van Dusen* opinion has been aptly described:

> As [Justice] Goldberg set up the problem, the failure to find specific congressional intent to abridge plaintiff's so-called right is taken as support for the opposite intent. However, the major premise that plaintiffs acquire rights to a system of law has been shown vulnerable to attack; the legislative history of §1404(a), as has been noted, is a virtual blank; no one intended anything about applicable law after transfer. [footnotes omitted]

Note, *Choice of Law After Transfer of Venue*, *supra*, 75 Yale L.J. at 123. To the extent that Congressional intent may be discerned from either the legislative history or the purpose of §1404(a), that evidence supports the application of the transferee forum's choice of law rules in all cases, as being in accordance with both the doctrine of forum non conveniens and the straightforward reading of *Erie* and its progeny.

Petitioners also complain that application of the choice of law rules of the transferee forum will result in a "less diligent"[6] "plaintiff's being able to use 28 U.S.C. §1404(a) as a forum shopping device to obtain the application of a more favorable law." (Petitioner's brief at 24) The specter of the so-called "blundering plaintiff" is thus raised as an argument for rewarding the "clever plaintiff"[7] by interpreting 28 U.S.C. §1404(a) in a manner which is unsupported by either legislative history or the purpose of §1404(a). As the Third Circuit correctly observed, "allowing plaintiffs to correct a choice of venue error is less problematic than allowing plaintiffs to bootstrap favorable law into a forum." (Petition for a Writ of Certiorari at A. 12). This is so for two basic reasons. First, a blundering plaintiff who obtains a transfer in order to avoid the bar of the original forum's statute of limitations is doing nothing which could not have been accomplished had he or she either originally commenced the action in the transferee forum, or simply dismissed the original action and filed a second action in the transferee forum. Therefore, application of the transferee forum's choice of law rules is not objectionable as a change in status quo ante-Judicial Code of 1948 which is unsupported by Congressional intent. Second, the blundering

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[6] Using their skewed logic, Petitioners, having waited more than a year beyond the lapse of their home state's applicable statute of limitations, are presumably transformed into diligent plaintiffs by spuriously filing in a forum with no connection with the litigation.

[7] Note, *Choice of Law in Federal Courts after Transfer of Venue*, 63 Cornell L. Rev. 149, 156 (1977).

plaintiff does not have an unfettered right to obtain transfer merely because the application of the transferee forum's choice of law rules would be favorable. As a threshold matter, transfer will not be granted unless to do so would be for the convenience of the parties and witnesses. *Delinski v. Raymark Industries, Inc.*, 819 F.2d 377, 383 (3d. Cir. 1987) (Becker, J., concurring). *O'Brien v. Lake Geneva Sugar Shack, Inc.*, 585 F. Supp. 273 (N.D. Ill. 1984). Furthermore, the transferee forum will usually have a more significant relationship to the litigation, making the application of its choice of law rules more appropriate.

The harm, if any, created by the prospect that a blundering plaintiff will occasionally be able to use 28 U.S.C. §1404(a) to obtain relief from an improvident selection of original forum pales beside the pernicious results which adoption of Petitioners' construction of §1404(a) would produce. Litigants with claims which are time-barred in the forum in which they arose would no longer be deterred by the inconvenience and expense of litigating their claims in distant jurisdictions whose sole recommendation as a forum is a favorable statute of limitations. The statement in Judge Seitz's dissenting opinion that the Ferenses "had no choice [but to file in Mississippi] at the time they decided to sue" (Petition for a Writ of Certiorari at A-15) ignores several important alternatives. Petitioners' obvious choice would have been to file a claim in Pennsylvania within two years after July 5, 1982. Having failed to do so, the Ferenses could simply have foreborne the filing of any action. Unhappily, in the present day climate the right to seek redress for an alleged wrong has now apparently become a legal obligation in some eyes. Yet, not every person who believes that

he or she has been injured by the wrongful act of another is willing to file suit anywhere in the United States so long as a forum exists in which personal jurisdiction and venue are proper, and the statute of limitations has not lapsed. Some will bear their misfortunes in such circumstances without filing suit, after weighing in the balance the merits of the claim and the severity of the injury as against the inconvenience of proceeding in a distant forum. If Petitioners' interpretation of 28 U.S.C. §1404(a) is adopted, then such persons no longer need consider the inconvenience which will attend litigation of their state claims. Alternatively, the Petitioners could have elected to limit their attempts to recover to the timely filed 'Warrant/ Action.

Moreover, a ruling in Petitioners' favor could stimulate many filings in inconvenient forums for the purpose of capturing favorable "procedural" choice of law rules other than those relating to the statute of limitations. Such choice of law rules may include those governing burden of production, presumptions, burden of persuasion, sufficiency of evidence, competency of witnesses, and statute of frauds. *See Restatement (Second) Conflict of Laws*, §§126-141 (1971). R. Leflar, *American Conflicts Law*, §§ 121-126 (3d ed. 1977). Although such rules are considered to be procedural by the original forum, and thus applicable even to claims governed by foreign substantive law, they may well so affect the outcome of litigation that *Erie* requires their application in diversity actions. *See Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939). In the past plaintiffs' counsel have undoubtedly been deterred from brazenly attempting to capture such favorable choice of law rules by the prospects that the defendant might elect not to seek transfer, thereby subjecting plaintiff to the inconvenience of litigating in a distant forum; or, at best, of having incurred the expense of a distant filing without the guarantee that the transferor forum's choice of law rules would apply following a plaintiff-initiated transfer.

In *Van Dusen v. Barrack*, *supra*, the Court buttressed its conclusion that 28 U.S.C. §1404(a) was not intended to be used by defendants to obtain a favorable change of law by citing the then recently published tentative draft of the American Law Institute's *Study of the Division of Jurisdiction between State and Federal Courts*. 376 U.S. at 637 n. 36. The final text of the ALI study provides in the case, *inter alia*, of a plaintiff-initiated transfer under 28 U.S.C. §1404(a) that:

> To the extent that a district court is obliged to apply the law of a particular State, including rules with respect to refusal to adjudicate the merits of a controversy and rules for selecting the applicable rule of decision, the court to which an action is transferred under this section shall apply the same law that it would have applied had the action been commenced in that court.

American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts*, §1306(c) (1969).* The comment to the preceding section states:

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* The non-enactment of S. 1876, proposing to adopt the entire ALI study as law, has no significance. Section §1306(c) was only of a very minor part of that bill (which of course also included §1305(b) proposing to codify *Van Dusen*'s holding).

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> This subsection resolves the choice-of-law problem when an action is transferred on motion of the plaintiff, or is transferred in lieu of being dismissed, by providing that the state law which the transferee court, is obliged to apply shall be that of the state in which it sits. This treatment of the problem is the opposite from that provided in §1305(b) when the defendant is the moving party. The governing principle there was that the defendant ought not by resort to the transfer device to be able to frustrate any choice-of-law advantage which the plaintiff might gain from his choice of forum. When transfer is granted in lieu of dismissal or when the plaintiff for some other reason is seeking a transfer, he ought not to carry with him the choice-of-law advantage resulting from his initial choice of forum, even if that choice was made without full knowledge of the facts.

Id., at 155. Citing the ALI study, the District of Columbia Circuit has commented that "[a] strong argument, however, favors application of the law of the transferee state in such instances." *In Re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1173 n. 4 (D.C. Cir. 1987)(dictum). The 1976 edition of *Federal Practice & Procedure* also opined that following a §1404(a) transfer on plaintiff's motion "it seems that the law of the transferee state should control." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, §3846 at 234 (1976). The most recent edition of that treatise takes the same view, but

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The probable reason for the failure to enact the bill lies in its controversial proposals regarding diversity jurisdiction. The non-enactment cannot seriously be regarded as an indication of Congressional attitudes toward applicable choice of law rules in the case of either plaintiff-initiated or defendant-initiated transfers.

notes: "Although much can be said for applying the law of the transferee state when it is plaintiff who has moved [citing the ALI study], the cases seem increasingly to be applying the law of the transferor court regardless of which party moved for transfer if that court was proper in terms of venue and personal jurisdiction." [footnotes omitted] 15 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, §3846 at 367 (2d ed. 1986).

While opinions by the Sixth Circuit, Ninth Circuit and Eleventh Circuit (as well as a superceded Seventh Circuit opinion) have stated that the transferor forum's choice of law rules should apply in the case of all §1404(a) transfers in which personal jurisdiction and venue are proper, those opinions are not persuasive on that point for several reasons. In the first place the opinions involved factual situations in which transfer was probably granted pursuant to 28 U.S.C. §1406(a), or involved §1404(a) motions where personal jurisdiction was lacking over the defendant. *Martin v. Stokes*, 623 F.2d 469, 473 n. 5 (6th Cir. 1980). *Nelson v. International Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983). The defendant also contended that personal jurisdiction was lacking in *Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982). The cases all hold (consistent with §1306(c) of the ALI study) that in such circumstances the transferee forum's choice of law rules should apply so that the "clever plaintiff" will not be able to use either §1404(a) or §1406(a) to capture a favorable choice of law rule which would not otherwise have been applied in the transferee forum. None of the opinions, other than that in *Martin v. Stokes*, contained much discussion attempting to support the conclusion that the transferee

forum's choice of law should apply following a plaintiff-initiated transfer where personal jurisdiction and venue were proper in the transferee forum.[9] The reasoning of *Martin v. Stokes*, however, suffers from the same weaknesses as those in Petitioners' argument which have already been pointed out.

Thus, in *Martin v. Stokes* the Sixth Circuit relied upon that portion of the *Van Dusen v. Barrack* opinion which concluded that "the history and purposes of §1404(a) indicate that it should be regarded as a federal judicial housekeeping measure" 376 U.S. at 637, without conducting any inquiry as to why the Court expressly limited its holding to cases involving defendant-initiated transfers. Similarly, the Sixth Circuit failed to look beyond *Van*

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[9] Thus, the Ninth Circuit simply stated, in what was clearly dictum: "In the former case [of transfer for convenience pursuant to 28 U.S.C. §1404(a)], we must apply the law of the transferor court to prevent parties from seeking a change of venue to take advantage of more favorable laws in another forum. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964)." 716 F.2d at 643. The Eleventh Circuit's entire discussion was as follows: "The concern for uniformity of results achievable by suing in state and federal courts, however, is equally pressing when transfer is not on defendant's motion." [citations omitted] 689 F.2d at 991 n. 14. Similarly, the Seventh Circuit's superseded opinion merely held: "However, when a plaintiff has exercised his choice of forum in the first instance by selecting a permissible forum, the state law of that forum should govern the action regardless of which party initiates a transfer. *Martin v. Stokes*, *supra*, 623 F.2d at 473. Because we agree that such an approach to plaintiff-initiated transfers under 28 U.S.C. §1404(a) compliments the policy underlying the *Van Dusen* rule, we adopt that approach here." *Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1225 (7th Cir. 1984).

Dusen v. Barrack's pronouncements to ascertain whether Congress intended that the law of the transferee forum should apply following a plaintiff-initiated §1404(a) transfer. Finally, the Sixth Circuit was unduly concerned with the benefit which might be conferred upon the blundering plaintiff by interpreting §1404(a) as requiring application of the transferee forum's choice of law rules following a plaintiff-initiated transfer. 623 F.2d at 472 and 473. Neither *Martin v. Stokes*, nor any of the other decisions upon which Petitioners rely, have adequately considered the practical effects of "allowing plaintiffs to bootstrap favorable law into a forum" or, more importantly, whether Congress intended that 28 U.S.C. §1404(a) should be utilized in such a manner.

The better reasoned approach, and that which is most consistent with the Congressional intent regarding applicable choice of law rules is that taken by the Third Circuit in this case, as well as by those district courts which have refused to allow plaintiffs to employ §1404(a) to transport a favorable statute of limitations after intentionally filing in an inconvenient forum, *Jenkins v. Armstrong World Industries, Inc.*, 643 F. Supp. 17 (D. Idaho 1985)[10], or those which have indicated that the statute of limitations of the transferee forum may be applied where plaintiff has

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[10] "[A] number of noted scholars have indicated that the *Van Dusen* rule should not apply where the plaintiff has intentionally selected an inconvenient forum, where the state courts of the transferor district would have dismissed the action based on forum non conveniens, or where the state courts of the transferor court would not have personal jurisdiction over the defendant, or where the transfer was made on plaintiff's motion." [footnote and citations omitted] 643 F. Supp. at 21.

improvidently selected an inconvenient original forum whose statute bars the action. *O'Brien v. Lake Geneva Sugar Stack, Inc.*, 585 F. Supp. 273 (N.D. Illinois 1984), *Leo Schwinsky Motors, Inc. v. Chrysler Motors Corp.*, 270 F. Supp. 418 (E.D. Cal. 1967). *See also* Smith v. *Morris & Manning*, 657 F. Supp. 180 (S.D.N.Y 1987).

II. If 28 U.S.C. §1404(a) Requires Application Of The Transferee Forum's Choice Of Law Rules In The Case Of Diversity Actions Transferred On Plaintiff's Motion, Then The Statute, As So Interpreted, Exceeds The Powers Of Congress Under The United States Constitution And Impermissibly Infringes Upon The Powers Reserved To The States By The Constitution.[11]

In *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) the Court declared:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permitted except as to matters by the Constitution specially authorized or delegated to the United States.

In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) the Court concluded that the principles upon which *Erie R. Co. v. Tompkins* was based required federal district courts hearing diversity actions, whether on the law or equity side, to apply the statute of limitations which would have been applied by courts of the forum state in which the federal court sat. The Court reached its conclusion despite arguments that the statute of limitations should be considered as a mere matter of "procedure". Thus, the Court stated:

> It is therefore immaterial whether statutes of limitation are considered either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to ensure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlines *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a

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[11] Because 28 U.S.C. §2403(a) may be applicable in light of this argument three copies of Respondent's brief are being served on the Solicitor General pursuant to Supreme Court Rule 28.4(b). Proof of service will be filed separately by counsel for Respondent.

> State court a block away should not lead to a substantially different result. . . . Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Guaranty Trust Co. v. York, *supra*, 326 U.S. at 109-110. Subsequently, the Court distilled the foregoing principles into the so-called "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Pennsylvania has a strong policy of closing its courts to litigation which is time-barred under its tort statute of limitations. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 827 (3d Cir. 1985). If Petitioners' interpretation of 28 U.S.C. §1404(a) is adopted, then Mississippi's statute of limitation will, by virtue of the accident of federal diversity jurisdiction, be transmuted into the Pennsylvania statute of limitations for a cause of action which arose in Pennsylvania. As the result of its not being a Pennsylvania citizen, Respondent will be required to defend Petitioners' Tort Action in the federal courts of Pennsylvania even though that action could not have been pursued against Respondent in either Pennsylvania state or federal courts had Respondent been a Pennsylvania resident. Such a result flatly contradicts *Erie's* principles regarding both inherent constitutional limitations on federal power and the restraints imposed by the Equal Protection Clause of the Fourteenth Amendment. *Van Dusen's* application of *Erie* supports the conclusion that 28 U.S.C. §1404(a) should not be used by either party to achieve a different outcome depending on whether the case is tried in state or federal court. Similarly, Respondent's analysis of the import of *Erie* for Petitioners' attempted use of §1404(a) is consonant with the restrained view of federal judicial power under the Due Process Clause and Full Faith and Credit Clause which imbued the Court's recent decision in *Sun Oil Co. v. Wortman*, ___ U.S. ___, 108 S. Ct. 2117 (1988).

CONCLUSION

For the foregoing reasons the judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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